UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DISCOUNT VIDEO CENTER, INC. *Plaintiff,* v. **DOES 1 – 29,** *Defendants*.	*Case No.*: **1:12-cv-10805**
PATRICK COLLINS, INC. *Plaintiff,* v. **DOES 1 –79 ,** *Defendants*.	*Case No.*: **1:12-cv-10538**
PATRICK COLLINS, INC. *Plaintiff,* v. **DOES 1 – 36,** *Defendants*.	*Case No.*: **1:12-cv-10758**

PLAINTIFF'S RESPONSE TO SHOW CAUSE ORDER

Plaintiff responds to Court's Order to show cause, and respectfully requests the Court not dismiss the above-captioned cases as pursuant to Fed. R. Civ. P. 4(m) for failure to effect timely service. Plaintiff has "good cause" for its failure to serve defendant(s) within 120 days. Therefore, Court should enlarge the time for service, allowing Plaintiff to serve defendants.[1]

INTRODUCTION

On November 7, 2012, the Court ordered Plaintiff to show cause as to why Court should not dismiss the above-captioned cases for failure to serve defendants within 120 days of filing the complaint.

ARGUMENT

I. ENLARGEMENT OF TIME FOR PLAINTIFF TO SERVE IS PERMISSIBLE.

In consideration of: the applicable rules (*infra*. pp. 2 – 3); the harmony of the rules, synchronously showing good cause (*infra*. pp. 3 – 6); and, other factors warranting enlargement of time, (*infra*. pp. 6 – 7); the Court should **not** dismiss for failure to serve.

II. APPLICABLE RULES PERTAINING TO SERVICE OF PROCESS.

In *United States v. Tobins*, (D. Mass. 2007), Magistrate Judge Dein provides a thorough framework for the applicable rules pertaining to service of process; she states, in the relevant part,

> Fed. R. Civ. P. 4(m) governs the timing of service of process. It provides in relevant part, "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." "Once it has been established that proper service of process has not been made within the 120-day time period, there is a two-step inquiry under Rule 4(m)." *Shaw v. District of Columbia*, No. 05-1284, 2006 U.S. Dist. LEXIS 29423, 2006

[1] Even in the absence of a showing of good cause, Rule 4(m) grants discretion to the district court to extend the time for service of process. *See Horenkamp v. Van Winkle and Company, Inc.*, 402 F.3d 1129, 1132 (11th Cir. 2005).

> WL 1371681, at *8 (D.D.C. May 15, 2006) (slip op.). *See also In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) ("Rule 4(m) requires a two-step analysis in deciding whether or not to extend the prescribed time period for the service of a complaint"). First, the court must determine whether the plaintiff has met its burden of establishing "good cause" for the untimely service. *See Shaw*, 2006 U.S. Dist. LEXIS, 2006 WL 1371681, at *8; *In re Sheehan*, 253 F.3d at 512. The "court must extend the time for service of process if there is good cause shown for the delay." *Riverdale Mills Corp. v. United States DOT FAA*, 225 F.R.D. 393, 395 (D. Mass. 2005). "Second, if there is no good cause, the court has the discretion to dismiss without prejudice or to extend the time period." *In re Sheehan*, 253 F.3d at 512. *See also Henderson v. United States*, 517 U.S. 654, 662, 116 S. Ct. 1638, 1643, 134 L. Ed. 2d 880 (1996) (courts have been accorded discretion to enlarge the 120-day period even if there is no good cause shown) (quotations and citations omitted); *Riverdale Mills Corp.*, 225 F.R.D. at 395 (if good cause is not shown, court still has discretion to extend time for service of process).

483 F. Supp. 2d 68, 77-78.

As described below, the Plaintiff's demonstration of good cause for any delay in the proper service of process upon Defendants requires that this Court grant the plaintiff an extension under Rule 4(m), and not dismiss the case. Local Rule 4.1 also addresses the untimely service of process. It provides in relevant part:

> (A) Any summons not returned with proof that it was served within one-hundred twenty (120) days of the filing of the complaint is deemed to be unserved for the purpose of Fed. R. Civ. P. 4(m).
>
> (B) Counsel and parties appearing pro se who seek to show good cause for the failure to make service within the 120 day period prescribed by Fed. R. Civ. P. 4(m) shall do so by filing a motion for enlargement of time under Fed. R. Civ. P. 6(b), together with a supporting affidavit. If on the tenth day following the expiration of the 120 day period good cause has not been shown as provided herein, the clerk shall forthwith automatically enter an order of dismissal for failure to effect service of process, without awaiting any further order of the court.

L.R. 4.1.

III. PLAINTFF DEMONSTRATES GOOD CAUSE.

Based on the circumstances before this Court and other cases led by Plaintiff's Counsel, the Plaintiff has met its burden of establishing good cause for any delay in its ability to serve Defendants within the 120 days prescribed by Fed. R. Civ. P. 4(m). "Good cause means a valid reason for delay, such as the defendant's evading service." *Coleman v. Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir. 2002). Moreover, as the court explained in *McIsaac v. Ford*, 193 F. Supp. 2d 382 (D. Mass. 2002),

> [G]ood cause is likely (but not always) to be found when the plaintiffs (sic) failure to complete service in timely fashion is a result of a third person, typically the process server, the defendant has evaded service of process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstance[s], or the plaintiff is proceeding pro se or in forma pauperis. Pro se status or any of the other listed explanations for a failure to make timely service, however, is not automatically enough to constitute good cause for purposes of Rule 4(m).

McIsaac, 193 F. Supp. 2d at 383 (quoting Wright & Miller, Federal Practice and Procedure: Civil 3d § 1137, at 342 (2002)) (first alteration in original). In the instant case, the Plaintiff has established that it has acted diligently in attempting to effect service upon Defendants.

The Court contends that Plaintiff's Counsel has not served the any of defendants in the above-captioned case, suggesting bad-faith litigation. However, the Court had quashed subpoenas and ordered Plaintiff not to use any of the identities learned from the subpoena process. In other words, **Plaintiff had no ability to serve defendants in this case**.

The Court also contends that Plaintiff's Counsel has not served the many of defendants in other cases, suggesting bad-faith litigation. However, Counsel **has initiated the process of service upon dozens of defendants** (many of which have just recently occurred in the last two weeks). Counsel is not filing proof of summons until it has conferred with each defendant about possibly trying to seal filings that elicit identifying information of each defendant. Counsel feels that if identities are kept under seal, a concern that Plaintiff's are strong-arming putative defendants into settling cases because of the nature of the copyrighted works will disappear.

Also, dozens of waivers of summons went out to many defendants weeks ago. However, those defendants were severed from their cases and accordingly return receipt of waiver of summons was never filed on the docket. For those defendants whom have been served summons, Counsel is awaiting defendants response to Plaintiff's proposals to seal fillings, which have defendant's identifying information.

The Court also was troubled by Plaintiff's desire to depose subscribers yet not making it a part of the renewed discovery request. However, Counsel was under the impression that the Court was going to make a separate Order, allowing for depositions. This confusion stemmed from discussion on this topic in a hearing. Counsel for the Plaintiff stated it would be amenable to deposing subscribers. Counsel believed this to have the effect of an oral motion. Believing that depositions were right around the corner, Counsel had already begun preparing. For one, Counsel had reviewed about 20 resumes of court-reporters/stenographers for use of depositions. Also, Counsel had already begun budgeting for depositions and preparing clients for this course of events.

Further, "[t]he rules governing service of process are not designed to create an obstacle course for the plaintiffs to navigate, or a cat-and-mouse game for defendants who are otherwise subject to the court's jurisdiction." *TRW, Inc. v. Derbyshire*, 157 F.R.D. 59, 60 (D. Colo. 1994). Plaintiff took sufficient reasonable steps to identify and serve infringers, given the constraints (*e.g.* quashing of subpoenas, delays from ISPs), and delays were **not due to any neglect on the part of the Plaintiff**. *See Benjamin v. Grosnick*, 999 F.2d 590, 592 (1st Cir. 1993) (district court abused its discretion by dismissing case for insufficient service of process where plaintiffs "did not purposefully delay personal service" and "completed all of the steps within their power necessary to effectuate such service").[2] Therefore, pursuant to Fed. R. Civ. P. 4(m), the Plaintiff is entitled to an extension of the time to perfect service of process in this

[2]*See also* Wright & Miller, Federal Practice and Procedure: Civil 3d § 1137, at 373-374 (2002). ("In determining what is not good cause, the federal courts obviously are obligated to balance the clear intent of Rule 4(m) and the desire to provide litigants their day in court. Insisting on a timely service of process and assuring litigants a just adjudication on the merits of an action are not inconsistent, but over-emphasis on either could lead to undesired consequences. If good cause under Rule 4(m) is measured too restrictively, then the risk is that many good faith plaintiffs may be treated harshly.").

case. Accordingly, the case should not be dismissed.

IV. ADDITIONAL CONSIDERATIONS WARRANTING AN ENLARGEMENT OF TIME FOR SERVICE OF PROCESS.

Even if the Plaintiff had not shown good cause for any delay that may have occurred, this court should exercise its discretion and extend the time for service.

> If good cause is lacking, the determination of whether to extend the time for service of process is based on a number of factors, including whether: "(a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer … prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed."

Riverdale Mills Corp., 225 F.R.D. at 395 (quoting *In re Sheehan*, 253 F.3d at 512). *See also Coleman*, 290 F.3d at 934 ("most district judges probably would exercise lenity and allow a late service" where defendant shows no actual harm in ability to defend lawsuit due to delay, where defendant likely received actual notice shortly after attempted service, and where dismissal would bar claims due to expiration of statute of limitations). Consideration of two of these factors weighs in favor of an extension.

"[O]ther than the inherent 'prejudice' in having to defend the lawsuit," Defendants cannot show any actual harm to their ability to defend the action as a result of any delay in service. *Shaw*, 2006 U.S. Dist. LEXIS 29423, 2006 WL 1371681, at *8. Furthermore, **dismissal of this action would likely result in many of the ISPs to delete subscriber records for the IP addresses that were observed infringing Plaintiff's copyrights**. Accordingly, any "dismissal without prejudice [would have] the effect of dismissal with prejudice[.]" *Coleman*, 290 F.3d at 934.

This Court also noted that motion for enlargement of time was not made in some cases. However, "[no]thing in Rule 4(m) or the Advisory Committee Notes requires that before the court may use its discretion to extend the deadline for service of process, the plaintiff must have moved for an extension of time." *United States v. Tobins*, 483 F. Supp. 2d 68, 81 (D. Mass. 2007).

"[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Henderson*, 517 U.S. at 672, 116 S. Ct. at 1648. An extension of the time to serve process in this case will enable the parties to proceed on the merits while at the same time meeting these objectives.

CONCLUSION

For the above reasons, Court should not dismiss and should extend time to serve defendants.

Respectfully submitted,

Dated: November 14, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2012, the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be served via first-class mail to those indicated as non-registered participants.

Marvin Cable, Esq.